S. 774

S. 774 is the government-wide FOIA relief Bill which was unanimously reported favorably by the Senate Judiciary Committee last year (S. 1730 in the 97th Congress). This Bill contains several provisions that will be of particular benefit to the FBI.

S. 774, unlike Senator Goldwater's Bill, S. 1324, seeks to amend the FOIA itself. The amendments in S. 774 would do the following:

-- Clarify several of the Act's exemptions and procedures to strengthen the protection given to information where disclosure would result in an unwarranted invasion of personal privacy, harm the public interest in law enforcement, injure the legitimate commercial interests of private parties who have submitted proprietary information to the government, or impede the effective collection of intelligence.

-- Preclude the use of the Freedom of Information Act as a means to circumvent discovery rules by parties in litigation.

-- Provide for expedited processing of requests from the media and others seeking information for broad public dissemination while establishing realistic time requirements for agencies to respond to requests and decide appeals.

-- Establish procedures enabling submitters of confidential commercial or financial information to object to the government's release of such information.

-- Permit the government to charge requesters fees that more closely reflect the actual costs of the government's search and review of documents.

-- Add two new exemptions from the Act for records generated in legal settlements and records containing technical information the export of which is controlled by law.

While S. 774 was never intended to address any of the unique problems facing the CIA or the other agencies within the Intelligence Community, we would be required to comply with any changes made by enactment of this legislation. We have no objections to any of the proposed changes.

S. 774 has been reported out favorably from the Senate Judiciary Subcommittee on the Constitution, chaired by Senator Orrin Hatch (R, VT). It has just been reported out of full Committee (16 June) which means that the Committee will now be ready to consider our FOIA legislation on sequential referral from the SSCI.

TITLE II—OTHER PROGRAMS

NATIONAL RESEARCH SERVICE AWARDS

SEC. 201. (a) Subsection (c) of section 472 is repealed. Subsection (d) of such section is redesignated as subsection (c).

(b) The first sentence of subsection (c) of such section (as redesignated by subsection (a) of this section) is amended by striking out "and" after "1982," and by inserting before the period a comma and "$195,048,000 for the fiscal year ending September 30, 1984, $204,800,400 for the fiscal year ending September 30, 1985, and $215,040,420 for the fiscal year ending September 30, 1986".

NATIONAL LIBRARY OF MEDICINE; ASSISTANCE TO MEDICAL LIBRARIES

SEC. 202. (a) Section 383(b) is amended by striking out ", and the Secretary shall include in his annual report to the Congress a statement covering the recommendations made by the Board and the disposition thereof" in the first sentence.

(b) Section 390(c) is amended by striking out "and" after "1981,", and by inserting before the period a comma and "$9,763,000 for the fiscal year ending September 30, 1983, $10,500,000 for the fiscal year ending September 30, 1984, $11,025,000 for the fiscal year ending September 30, 1985, and $11,576,000 for the fiscal year ending September 30, 1986".

REPORTS; MISCELLANEOUS

SEC. 203. (a) Section 475 is amended by adding at the end thereof the following new subsection:

"(d) By January 1, 1984, and annually thereafter, the Secretary shall prepare and transmit to the Committee on Labor and Human Resources of the Senate and the Committee on Energy and Commerce of the House of Representatives a report concerning any activites undertaken in the preceding fiscal year to improve the grant, contracting, accountability, and peer review procedures of the National Institutes of Health, including the National Cancer Institute.".

(b) Title IV (as amended by section 105 (a) of this Act) is further amended by inserting after section 479 the following new section:

"INVESTIGATIONS

"SEC. 480. The Director of each national research institute in the National Institutes of Health shall notify the National Advisory Council for such research institute of the status of any investigation concerning any recipient of a grant or contract from such research institute, unless the office or unit of the national research institute or of the National Institutes of Health which is conducting the investigation advises the Director of such national research institute that disclosure to the Council under this section will jeopardize the investigation.".

(c) Within one year after the date of enactment of this Act, the Director of the National Institutes of Health shall establish procedures for the appeal of determinations made with respect to applications for grants and cooperative agreements for biomedical research under the Public Health Service Act.

By Mr. HATCH (for himself, Mr. THURMOND, and Mr. DECONCINI):

S. 774. A bill entitled the "Freedom of Information Reform Act"; to the Committee on the Judiciary.

FREEDOM OF INFORMATION REFORM ACT

Mr. HATCH. Mr. President, I am pleased to introduce the Freedom of Information Reform Act which was unanimously approved in the last Congress by a vote of 17 to 0 in the Judiciary Committee. This bill enjoys broad bipartisan support and reflects the accumulated wisdom of many diverse interests, including media representatives, public interest groups, the Reagan administration, members of the business community, and law enforcement agencies. The FOIA Reform Act has been widely hailed as a reasonable and worthwhile compromise by these diverse and often divergent interests because it achieves the dual goals we set when embarking upon improving the act. Namely, the bill eliminates many of the current problems of the act without weakening its effectiveness as a vaulable means of keeping the public informed about government activities. As the Washington Post accurately noted:

It is quintessentially American to believe that the people control the government and that they have a right to know what the government is doing. The Judiciary Committee bill preserves that right. (Washington Post, May 25, 1982 page A16.)

Indeed, this right is preserved, and concomitantly the public is better served by the enhancements to the act which are included in this bill.

I would like to express my appreciation to Senators THURMOND and DECONCINI for their cosponsorship of this bill and their efforts on its behalf. The close and continuing cooperation of Senator LEAHY has been invaluable in our efforts to forge a consensus for reform, and I would especially like to thank him for his support and diligence in working toward a bipartisan solution to the problems of the FOIA.

Special note should also be taken of the important contibutions to the consideration of this bill made by members of the press. Their views were extremely helpful to the final resolutions of many of the difficult problems which we originally faced when our discussions on reform began.

It is also significant to note that the Subcommittee on the Constitution, which I chair, held more hearings to consider FOIA reform than has ever been held by any subcommittee on this subject. During the 1st session of the 97th Congress, from July 15, 1981, to December 9, 1981, the subcommittee held seven days of hearings on FOIA. Witnesses included representatives from the media, public interest groups, the Reagan administration, the business community, and law enforcement agencies. In addition, the subcommittee received a large number of written statements from other interested individuals and organizations that have become part of the permanent record of these hearings.

The bill, as approved by the Senate Judiciary Committee, is a 21-page bill that significantly reshapes the Nation's information policy. The bill deals with such diverse topics as protection of technical data—blueprints, repair manuals, and the like—important to our national security, protection of trade secrets and confidential business information in government files, protections against invasions of personal privacy, protection of law enforcement informants, investigations and techniques, and various other procedural reforms, such as assessment of appropriate user fees.

I. LEGISLATIVE BACKGROUND OF THE FREEDOM OF INFORMATION ACT

Understanding the need for refinement of FOIA requires an awareness of its background. The act was enacted in 1966, but the roots of the open information concept, with important limitations, may be traced to the first amendment.

Because a representative democracy requires an informed citizenry and government confidentiality in some contexts, the first amendment was crafted to secure a climate of free information without creating a constitutional right to obtain information from the government. In the words of Justice Felix Frankfurter:

Without a free press there can be no free society. Freedom of the press, however, is not an end in itself but a means to the end of a free society. (*Pennekamp* v. *Florida*, 328 U.S. 331, 354 (1946).)

Justice Frankfurter understood that the first amendment was part of a larger and more complex constitutional scheme which contemplated some balancing of privacy, confidentiality, and openness to insure the overriding goal of a free and secure society. In the first Congress, as is still the case today, the primary issue concerning the first amendment was whether the amendment would give constitutional effect to common-law principles or embody libertarian concepts.

James Madison, who submitted the first draft of the amendment to the Congress, attempted to constitutionally codify his own expansive libertarian notions in the broadest possible language. Madison was persuaded that an absolute individual right to know was the only way to prevent the problems of censorship the colonials had endured under the rule of the Crown. Madison urged the First Congress to adopt language stating:

No State shall violate the equal rights of conscience or the freedom of the press. (*Annals of Congress 1789–1791*, vol. 1–441, 753–4.)

This was not adopted. Its failure was not, however, a vote for government censorship powers, but a recognition that traditional common-law rules prohibited prior restraint without the potential for precluding confidentiality when necessary to protect freedom, such as in "military operations and foreign negotiations" to use the examples of George Mason. (Jonathan Eliot, Ed., The debates in the several State conventions on the adoption of the Federal Constitution," Vol. 3, 170.)

The language of the first amendment, which was adopted, however, did not then or now comprise a constitutional freedom of information act.

as Former Justice Stewart has stated Potter Stewart, "or of the press" (26 Hastings Law Journal 631, 636 (1975).) Instead, in the words of James Wilson:

> What is meant by liberty of press is that there should be no antecedent restraint upon it; but every author is responsible when he attacks the security or welfare of the government, or the safety, character, and propriety of the individual. James Wilson. Pennsylvania and the Constitution, at 308.

The first amendment clearly was a compromise between Madison's libertarian concept of expansive free conscience rights and the view of Alexander Hamilton that the first amendment was unnecessary.

What the Congress gave the Nation was a constitutional provision that prevented most censorship, but created no affirmative rights of individual citizens to compel the government to disclose information. While the amendment clearly prohibits Congress from enacting prior restraints on publication, it makes no guarantees about the government's duty to actively provide information. In fact the government may even exercise prior restraint of information the public already has in some circumstances, such as in the face of a clear and present danger. (249 U.S. 47 (1919).) The popular notion of a constitutional public right to know, in the words of Prof. David O'Brien, "Has no basis in the text or historical background of either the Constitution or the First Amendment." (David M. O'Brien, "The Public's Right to Know," at 166 (1981).)

Although the public does not possess an enforceable constitutional right of access to governmental information, the concept of an informed electorate was a vital interest of the new Republic which the First Congress intended to secure with the first amendment's proscription of prior governmental restraint of individual's communications. (Id. at 53.) The general interest in an informed citizenry has commanded more attention in public policy debates recently as Congress has moved to grant and expand statutory rights to gain access to governmental information in the absence of an enforceable constitutional right.

The first statutory attempt to clearly define the parameters of public access to government information came in section 3 of the Administrative Procedure Act of 1946 (APA). (Pub. L. 79-404, 3, 60 Stat. 238 (1947).) In addition to requiring Federal agencies to index their files and make information available to the public, the act also provided certain disclosure exemptions. Under section 3 administrative officials were permitted to withhold any information "requiring secrecy in the public interest." Information could be withheld when the person seeking the material was not "properly and directly concerned," where the information was "held confidential for good cause found," or "when the information sought was related to the internal management" of a government agency or department. (Pub. L. 79-404, 3, 60 Stat. 238 (1946).)

Despite section 3's intention to increase governmental disclosure, its vague terms often frustrated that purpose. An individual's request could be denied because the agency did not find him "directly concerned" with the matter. The section 3 exemptions were construed to the point of absurdity, allowing one agency to withhold George Washington's intelligence methods nearly two hundred years later. (Hearings on Freedom of Information and Secrecy in Government, Sen. Jud. Comm. 85th Cong., 2nd Sess. 548 (1958), cited in J. O'Reilly, Federal Information Disclosure, 2-7 (1981).) Another agency withheld several telephone directories because they fell into "the category of information relating to the 'internal management' of the agency." (H. Rep. No. 1497, 89th Cong., 2d Sess. 5 (1966).) Once an information request had been denied a requester had no means to appeal the decision because section 3 did not provide a remedy for unlawful withholding.

A. THE FREEDOM OF INFORMATION ACT OF 1966

As Congress became more aware of the limitations built into section 3, amendatory legislation was introduced. The debates on this legislation stressed the need to provide citizens with adequate information to be responsible voters. For instance, Congressman John Moss asserted:

> [O]ur system of government is based on the participation of the governed * * * We must remove every barrier to information about—and understanding of—Government activities consistent with our security if the American public is to be adequately equipped to fulfill the ever more demanding role of responsible citizenship. (112 Cong. Rec. 13641 (1966).)

The purpose of the 1966 Freedom of Information Act, as stated by the Senate report, was to change the emphasis from withholding to disclosure while providing adequate protection for vital confidential government activities. (— Stat. — (1966) Current version of 5 U.S.C. 552 (1976).) This was accomplished by mandating disclosure and creating standards for withholding that could be easily understood and applied by the agencies and the courts.

With its exemptions Congress clearly recognized individual privacy rights and the need for some confidentiality in government. As noted above, Congressman Moss acknowledged the need to restrict disclosures that might endanger our society. The Senate report emphasized the same principle.

> It is not an easy task to balance the opposing interests, but it is not an impossible one either. It is not necessary to conclude that to protect one of the interests, the other must of necessity, either be abrogated or substantially subordinated. Success lies in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure. (S. Report 813.)

For the next 8 years, FOIA was often criticized. Even a Federal court called it poorly drafted. (*Washington Research Project Inc. v. Dept. of H.E.W.*, 366 F. Supp 929 (D.C.D.C. 1973).) Some critics went beyond legal analysis of the act to charge that it failed to provide the open access to government files that it had promised. An insightful observation of this aspect of FOIA's history, however, noted that these critics "seem to have [had] unreasonably high expectations. To satisfy such critics, the Act would have needed divine powers to reverse human nature and compel the silent to speak." (Clark, "Holding Government Accountable: The amended Freedom of Information Act", 84 Yale L.J. 741, 747-8 (1975).)

B. THE 1974 AMENDMENTS

After several years and in response to charges that FOIA had failed to keep it promises, Congress undertook to amend the act. The primary catalyst for this legislative reaction, however, was the Watergate incident. As the break-in was uncovered, skepticism about the executive branch swept through Congress, transforming the amendment of the 1966 act into an ethical issue.

In this emotionally charged atmosphere, the Senate bill to provide "open government" passed on a vote of 64 to 17, and by a vote of 349 to 2 in the House in October 1974. The veto was easily overridden in the House by a vote of 372 to 31 on November 20. In the Senate, however, the vote was very narrow (64 to 27)—exceeding the required two-thirds vote by 3.

Some of the inherent defects of the 1974 amendments were recognized by many Members of the Senate at the time of the override vote. Of greatest concern were the disclosure standard required by law enforcement agencies and the threats to personal privacy. As Senator Hruska stated:

> [I]t is extremely difficult if not impossible to prove that information, if disclosed, would invade a person's privacy or would impair the [law enforcement] investigation. The magnitude of such a task and the standards of harm that are defined in the amendment create serious doubt as to whether such a provision is workable aside from questionable in its wisdom.
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> * * * * *
>
> I cannot support the enrolled bill because it emphasizes the right to know to the detriment of the right of privacy and security and the interests of us all in a responsive government. 120 Cong. Rec. S. 36873 (1974).

To some degree, the specific issues of FOIA were clouded by the overriding issues and passions of the Watergate era. Some Senators, including Senator Robert Dole, attempted to focus on the specific FOIA issues by proposing a substitute amendment implementing improvements suggested by President Ford. The substitute, which was summarily rejected, incorporated a standard of disclosure which would have precluded jeopardy to law enforcement agencies.

The overly optimistic cost estimate of the bill provides one apparent example of the hasty consideration given the amendments due to the distractions of the Watergate scandal. Although the 1974 amendments limited fee collections, expanded access to government documents, and enhanced the availability of court-awarded attorneys fees for FOIA lawsuits, the House reported that the bill woud cost only $50,000 to $100,000 per year. This low figure should have been suspect because, additionally, agencies were required to absorb the cost of most of the expensive part of responding to a FOIA request, the reviewing of records to determine whether any portion could or should be classified as exempt. While no one knows the exact cost of FOIA today, estimates begin at $57 million and rise from there. Responding to a single request made by a renegade CIA agent has cost taxpayers over $500,000. Had Congress taken the time necessary to completely and adequately assess the implications of amending FOIA, it may have recognized the inherent problem of costs and avoided the resultant economic imbalance.

President Ford realized the impracticality of the costs provisions, in his message to the House explaining his veto. He pointed out that the law enforcement agencies would be economically hampared because the agencies could not afford to hire the large number of highly trained personnel necessary to review requested confidential files and records. Today the FBI has hired over 300 people and spends nearly $12 million annually to comply with FOIA.

The Constitution Subcommittee hearings in the 97th Congress were the most extensive oversight of FOIA yet undertaken. A major complaint which dominated those seven hearings was that the confidentiality of informants and investigations is jeopardized by the threat of FOIA disclosure of sensitive information. The documentation of this complaint at the hearings served to confirm the findings which have been compiled on the deleterious effects of FOIA on law enforcement. In 1978 the Senate Judiciary Subcommittee on Criminal Law concluded that:

> It can safely be said that none [of the sponsors of FOIA] foresaw the host of difficulties the legislation would create for the law enforcement community, nor did they foresee the utilization that would be made of the Act by organized crime and other criminal elements or the damage it would do to the personal security of individual citizens * * * Informants are rapidly becoming an extinct species because of fear that their identities will be revealed in response to a FOIA request."

In that same year the General Accounting Office released a study detailing 49 instances of potential informants refusing to cooperate with law enforcement authorities due to FOIA. In 1979, FBI Director Webster supplied documentation of over 100 instances of FOIA interference with law enforcement investigations or informants. In 1981, his list was expanded to 204 examples. In fact, no fewer than five different reports studying the impact of FOIA have concluded that the act has harmed the ability of law enforcement officers to enlist informants and carry out confidential investigations. Among these, the Attorney General's 1981 Task Force on Violent Crime found that FOIA should be amended because it is used by lawbreakers "to evade criminal investigation or to retaliate against informants." A 1982 Drug Enforcement Administration study documented that 14 percent of DEA's investigations were "aborted or significantly compromised" by "FOIA-related problems."

The Judiciary Committee hearings have indicated also that FOIA is being misused by businesses in an effort to obtain valuable trade secrets. The testimonies are replete with such examples of abuse by business concerns of the spirit and original purpose of FOIA. For example, Mr. Jack Pulley, an attorney with the Dow-Corning Corp., told us of an article entitled "Freedom of Information Act: Strategic Opportunities and Threats," in which the authors described how FOIA could be used to gain what they called "a differential competitive advantage."

Currently the standard of protection, "trade secrets and commercial or financial information obtained from a person privileged and confidential," presumes that all "confidential" information will be protected, but supplies no statutory definition for "confidential." Instead the Senate report specified that information "customarily not released to the public by the person from whom it was obtained" would be exempt. The House report extended protection to any information given the government in confidence "whether or not involving commerce or finance." Despite the breadth of protection intended by Congress, a Federal court unilaterally narrowed the exemption years later by requiring a submitter to demonstrate a "substantial competitive harm" in order to qualify for exemption. (*National Parks* v. *Morton*, 498 F. 2d 765 (D.C. Cir. 1974).) This broader test requires agencies and courts to guess about the economic impacts of disclosure and has led to numerous "reverse FOIA" lawsuits as submitters have attempted to protect proprietary data against release to commercial requesters who believe that the act, under current standards, can be used to learn valuable information about competitors.

The current standard has also been held to offer no protection to nonprofit submitters, such as hospitals, universities and scientific researchers, because they cannot show economic injury if the product of their research is disclosed.

In addition, the extensive Constitution Subcommittee hearings in the 97th Congress revealed other aspects of FOIA in need of fine-tuning. As mentioned earlier, the expanding costs of the act to the taxpayer suggested that those who directly benefit by requesting information should readily accept the responsibility of paying the cost of producing the information. The government agencies' inability to comply with the act's short time limits recommended a more workable time schedule for complying with requests in the event of a backlog of requests or other "unusual circumstances." Revising the act's second exemption to provide adequate protection for law enforcement manuals and instructions to investigators, auditors, or negotiators, was another aspect of the testimony. Removing important limitations on the exemption designed to guarantee personal privacy also emerged as an important aspect of FOIA reform. New exemptions to protect "technical data" (predominantly national security information) that may not be lawfully exported without a license and to protect Secret Service records were featured as subjects worthy of the protection currently given geological data and sensitive information about regulation of financial institutions under current exemptions 8 and 9.

The hearings also noted the need to reconsider the factors governing current determinations of types of information that may be released because they are "reasonably segregable" from classified or exempt portions of a requested record. Clearly giving away too many pieces of a sensitive record might, in the hands of a sophisticated requester, defeat the protections intended by the classification or exemption. Another item discussed was the propriety of requests from certain classes of requesters, including aliens, imprisoned felons, or parties in litigation with the Government who have access to information via the alternative route of discovery under the Federal Rules of Civil Procedure. These matters each became an element of the bill approved by the Judiciary Committee unanimously last Congress.

FEES AND WAIVERS

CURRENT SITUATION

Existing law allows agencies to collect only the costs of searching for and duplicating requested records. These costs are only a fraction of the true costs of answering a FOIA request. The cost of reviewing documents, editing out exempt material, and other processing accounts for the bulk of the expense of FOIA. Fees currently may be waived or reduced when "furnishing the information can be considered as primarily benefiting the general public."

CURRENT POLICY IMPLICATIONS

Congressional reports in 1974 estimated that FOIA would only cost between $40,000 and $100,000 annually governmentwide. Instead, direct

costs—not counting litigation expenses and other indirect costs—amounted to nearly $60 million in 1980. Moreover agencies collect only about 2 percent of the costs of the act in search and duplication fees. In one case, a single FOIA request for CIA documents cost the public nearly $500,000 to process. (*Apee v. CIA*, 517 F. Supp. 1335, 1342 N. 5.) In addition to the subsidy questions presented by current fee policies, the lack of a uniform fee schedule has made it difficult for a requester to predict the cost of particular documents.

BILL PROVISION

The bill would authorize the Office of Management and Budget to issue guidelines aimed at developing a uniform schedule of fees and processing procedures for all agencies. Under the bill, agencies could charge fees for "all costs reasonably and directly attributable to" search, duplication and other FOIA processing activities. No fee would be charged whenever the costs of routine fee collection and check processing would be likely to exceed the amount of the fee itself. Half of all fees collected would be retained by agencies to fund their FOIA operations. In addition, an agency could charge the fair market value for commercially valuable technological information generated or purchased by the Government at substantial cost.

Fee waivers for search and duplication charges would be authorized only when, as under existing law, an agency determines that it is in the public interest to furnish the information. New processing charges would be subject to waiver for various types of public interest groups, providing that the agency determines that the information is not requested for a commercial use.

TIME LIMITS: CURRENT SITUATION

Section (a)(6) of title 5, United States Code, requires an agency to make an initial determination within 10 days of receipt of a request whether to disclose the records. If the agency decides within that period to withhold the requested records, it must notify the requester of the reasons for the exemption within the same period. The requester may then choose to appeal the denial, in which case the agency has 20 working days to determine the appeal.

By notice to the requester, an agency may extend these time limits for an additional 10 days in three narrowly defined "unusual circumstances." If an agency fails to comply with any of these statutory deadlines, the requester is deemed to have exhausted his administrative remedies and may immediately file a suit in a district court to compel disclosure. Section 552(a)(6)(C) permits a court to grant extra time to an agency in "exceptional circumstances" where the agency can show it is also exercising "due diligence."

CURRENT POLICY IMPLICATIONS

The sheer volume and complexity of requests often make compliance with current time limits unrealistic. When pressed to hastily process requests, the agencies often perfunctorily deny requests or erroneously release information that should be exempt. Moreover, agencies with a substantial backlog simply cannot respond to important news media requests in a timely fashion.

BILL PROVISION

This section retains the 10-day time limit provision in existing law, but would allow agencies to take 30-working-day extensions in "unusual circumstances." The bill would broaden the definition of "unusual circumstances" to include new categories of such circumstances.

The bill contains new language providing that an agency shall not be considered to have violated the act's time limits unless and until a court rules on the matter.

DUPLICATIVE REQUESTS: CURRENT LAW AND POLICY IMPLICATIONS

Agencies are currently burdened with numerous requests for records consisting mainly of newspaper articles, magazine articles, and other records publicly available. Nonetheless, the act requires agencies to act as the world's largest library reference service. In other instances, the agencies receive multiple requests from the same party for the same information as the requester tries to update his information occasionally. The act now requires the agencies to send the same information time after time.

BILL PROVISION

The bill allows the agency to simply refer the requester to the date and source whereby he could get the information from a nearby library or public source.

MANUALS AND EXAMINATION MATERIALS: CURRENT SITUATION

Exemption 2 currently protects information "related solely to the internal personnel rules and practices of an agency." The scope of this protection has been confused by apparently conflicting views of this language in the House and Senate reports when FOIA was enacted. Although this language arguably protects manuals and instructions to investigators, inspectors, auditors, and negotiators, the judicial attempts to reconcile the House and Senate reports often led to inconsistent results.

CURRENT POLICY IMPLICATIONS

Although most courts recognize the sensitivity of instructions to investigators, inspectors, auditors, or negotiators, particularly when disclosure of the instructions could frustrate their legitimate Government functions, occasionally a judicial decision would reach a contrary result. See *Hawkes v. Internal Revenue Service* (507 F.2d 481—IRS audit guidelines ordered disclosed).

In addition, FOIA apparently authorizes the disclosure of examination materials which are exempt under the Privacy Act. To protect the objectivity and fairness of testing, as well as to promote consistency between the two acts, they should not conflict in this manner.

BILL PROVISION

This provision will clarify congressional intent in conformance with the original House report on exemption 2 and the majority of court cases on this subject. Several cases have found protectible interests in records specifically mentioned under this provision. For instance, *Caplan v. BATF* (587 F.2d 544 (1978)) protected a law enforcement manual; *Ginsburg v. FEC* (591 F.2d 752 (1978)) protected audit review guidelines; *Cox v. Department of Justice* (576 F.2d 1302 (1978)) protected U.S. marshal's manual. This provision will reaffirm Congress original intent, as expressed in the House report of FOIA, to protect sensitive law enforcement manuals and auditing records which might enhance vulnerability of Government functions to criminal activity.

Under the bill's new exemption 2, manuals and instructions to investigators, inspectors, auditors, or negotiators would be exempt "to the extent that disclosure * * * could reasonably be expected to jeopardize" their activities. Comparable new protection would apply to examination material.

PERSONAL PRIVACY: CURRENT SITUATION

The current sixth exemption protects from disclosure "personal and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."

CURRENT POLICY IMPLICATIONS

This exemption contains a threshold test that often frustrates the substantive content of the exemption. Thus, even if a record represents a "clearly unwarranted invasion of personal privacy," it does not qualify for protection unless the record is found in a personnel, medical, or similar file. Due to this formalistic file limitation, a court may permit disclosure of "clearly unwarranted invasions" of privacy simply because the invasion is found in the wrong kind of file. Congress intended to protect privacy not file labels.

BILL PROVISION

The new bill broadens protection of personal privacy by exempting any "record or information concerning individuals * * * the release of which could reasonably be expected to constitute a clearly unwarranted invasion of personal privacy." The bill also would provide express protection for mailing list data.

LAW ENFORCEMENT: CURRENT SITUATION

The current seventh exemption exempts investigatory records compiled for law enforcement purposes if those records also meet one of six further requirements (A-F). The six further criteria are intended to protect enforcement proceedings against disclosures to suspects, fair trials, person-

al privacy, identities of informants, investigative techniques, and the life and safety of law enforcement personnel.

CURRENT POLICY IMPLICATIONS

The current threshold language of the exemption means that records are only eligible for protection if they are investigatory records compiled for law enforcement purposes. This could mean that a record which jeopardizes one of the six requirements, such as "endanger the life * * * of law enforcement personnel," could be disclosed simply because it does not satisfy the formalistic test of being an investigatory record. This exalts form over substance.

The current language of (7)(A) requires an agency to show that disclosure of a record "interferes" with an enforcement proceeding. At the outset of an investigation, however, the agency often does not know which aspects of a record, if disclosed to the suspect, would interfere with the investigation. Thus the existing language could disclose to a suspect vital information about an ongoing investigation.

The current language of (7)(D) requires that a record conclusively "disclose the identity of an informant" before it qualifies for exemption. This ignores the commonsense principle that some information that does not in itself identify the informant can, in some circumstances known only to the suspect, result in such identification.

The threshold language about "investigatory" has meant that law enforcement manuals were not covered by the exemption for law enforcement techniques and procedures. The courts have also reached conflicting results about the protection to be afforded prosecutorial guidelines and other law enforcement techniques and procedures.

Finally, the language in (7)(F) has an obvious and absurd limitation. Under this language, records are only exempt if they endanger the life of a police officer, without giving similar protection to the life of any natural person.

Some kinds of investigations are particularly difficult to protect from abuse under FOIA. These are characteristically the kinds of investigations that involve organized crime, terrorism, and foreign counterintelligence. In these instances, the suspects often have the time, resources, and inclination to use FOIA to learn the identities of informants, the progress achieved by various investigations, and methods to avoid detection and prosecution. In short, these entities have in common a detached coordinating agent with the ability and motivation to circumvent the intent of the exemptions.

In hearings before the Constitution Subcommittee, FBI Director Webster documented 204 recent examples of FOIA substantially jeopardizing law enforcement.

BILL PROVISION

The amended exemption 7 would exempt from disclosure any information that could reasonably be expected to disclose a confidential source, including a State or local government agency or foreign government. This change would afford greater protection to information which should clearly be exempt from disclosure due to its serious implications for law enforcement investigations and the safety of confidential informants.

The present exemption only includes information that would disclose a confidential source. The rationale is to broaden the definition of confidential source to include State, local, and foreign governments.

ORGANIZED CRIME: CURRENT LAW

FOIA currently makes no provision for the extensive, damaging use made of the act by organized crime.

CURRENT POLICY IMPLICATIONS

There is much evidence of the existence of sophisticated networks of organized crime FOIA requesters. Under the current FOIA, there is a real danger which accompanies FOIA requests by organized criminal groups who have both the incentive and the resources to use the act systematically—to gather, analyze, and piece together segregated bits of information obtained from agency files. These "sophisticated criminals" can use the FOIA to determine whether an investigation is being conducted on him or his organization, whether there is an informant in his organization, and even who that informant might be. The release of records containing dates of documents, locations reporting investigations, the amount of material, and even the absence of information are all meaningful when compiled in the systematic manner employed by organized crime.

BILL PROVISION

This bill would exclude from disclosure all documents compiled in a lawful investigation of organized crime which are specifically designated by the Attorney General for purposes of this section. This exclusion would apply to documents that were first generated or acquired by such law enforcement authority within 8 years of the date of the request, except where the agency determines pursuant to regulations promulgated by the Attorney General that there is an overriding public interest in earlier disclosure or in a longer exclusion not to exceed 3 years.

Finally, the bill acknowledges that organized crime constitutes a special problem under FOIA. There is much evidence of the existence of sophisticated networks of organized crime FOIA requesters. For example, organized members in the Detroit area have been instructed to submit FOIA requests to the FBI in an effort to identify FBI informants. Through this concerted effort, the members and associates of this family have obtained over 12,000 pages of FBI documents.

The withholding of information on the basis of one of the enumerated exemptions can often be ineffective in avoiding the anticipated harms that would accompany disclosure because invoking the exemption itself becomes a piece of the mosaic. To invoke (b)(7)(D), for example, is to tell the requester, potentially a criminal seeking information in his illicit organization, exactly what he may want to know—that his organization has an internal informant.

In such a case, the Freedom of Information Act presents the potential for damage to sensitive FBI investigations, even though no release of substantive information is made. A requester with an awareness of the law's provisions, a familiarity with an agency's records systems, and whatever personal knowledge he brings to the situation, can gain insight into FBI operations regardless of his ability to procure a release of Bureau documents. For example, knowledge that a suspected informant's file has grown over a period of time is often enough to tip off the sophisticated criminal that the suspected informant has been talking to law enforcement officials too often.

Because of the mosaic problem with FOIA and the particular threat posed by organizations with historical continuity and an institutional memory and further because use of the exemptions themselves can become a "piece of the mosaic," simply broadening existing exemptions will not cure the problem of organized crime abuse of FOIA. Accordingly, the proposed bill would exclude from disclosure all documents compiled in a lawful investigation of organized crime which are specifically designated by the Attorney General for purposes of this section.

This exclusion would apply to documents that were first generated or acquired by such law enforcement authority within 5 years of the date of the request, except where the agency determines pursuant to regulations promulgated by the Attorney General that there is an overriding public interest in earlier disclosure or in a longer exclusion not to exceed 3 years. The bill would also allow an agency to use a "no records" response to mitigate the danger that information which is innocuous on its face could be ultimately harmful when considered in connection with the totality of information which the requester possesses.

ADDITIONAL EXEMPTIONS: CURRENT LAW

The existing statute does not adequately protect technical data the export of which is controlled under other statutes or Secret Service records connected with its protective functions.

CURRENT POLICY IMPLICATIONS

Although Congress has acted to limit export of critical technology that could be used contrary to U.S. interests, this policy can be frustrated by

acquisition of the same data or blueprints under FOIA. Testimony from the Justice Department and the Department of Defense has made the committee aware that technical data in the form of blueprints, manuals, production and logistic information formulas, designs, drawings, and other research data in the possession of agencies may be subject to release under the Freedom of Information Act. Much of this data was either developed by the Government or more typically submitted to the Government in conjunction with research and development of procurement contracts.

An example of the type of problem not contemplated by Congress during formulation of the FOIA exemptions in 1966 is the request from a foreign national seeking 70 documents totaling more than 9,000 pages which deal with the internationally sensitive area of satellites and their use by military organizations. An expense of over $4,000 in U.S. taxes would be required by the Department of the Air Force, in addition to more than 1,000 mid-level management man-hours, on a nonreimbursable basis, just to prepare the material for review. Moreover, a substantial portion of this sensitive, defense information is technical material on the "Critical Military Technologies List" which is subject to Federal export laws.

As a result of revisions to FOIA at the end of 1974, the quality and quantity of informant cooperation with the Secret Service has diminished dramatically. Under the current FOIA, informants are increasingly reluctant to come forward because they are fearful their identities will be revealed, adversely affecting the Service's ability to perform their protective and criminal investigative missions.

Robert R. Burke, Assistant Director for Investigations at the Secret Service, testified before the Constitution Subcommittee that his agency had approximately 75 percent less informant information than it had before the revised FOIA took effect at the end of 1974. Mr. Stewart Knight, Director of the Service, testified in 1977 that he had recommended that President Jimmy Carter refrain from traveling to two cities within the United States because the Service did not have adequate information to guarantee his safety. Mr. Burke's 1981 testimony noted that conditions have deteriorated even further since Mr. Knight's statement.

BILL PROVISION

The bill adds a new exemption (b)(10) to the Freedom of Information Act to exempt from mandatory disclosure, technical data that may not be exported lawfully outside of the United States except in compliance with the Arms Export Control Act (22 U.S.C. 2751, et seq.) and the Export Administration Act of 1979 (50 U.S.C. App. 2404).

This new exemption would insure that Congress intent to control the dissemination of sensitive technology could not be frustrated by a Freedom of Information Act request for information regarding technology subject to export control under these statutes. It would make clear that agencies such as the Department of Defense have the authority to refuse to disclose such information in response to a Freedom of Information Act request when the information is subject to export restrictions. This change would help effect Congress desire to limit and control the dissemination of critical technology. In the same vein, however, exemption 10 does not address the issue of restricting the flow of research information to, from or within the scientific community or society in general. Moreover, the proposed exemption has nothing to do with technical information developed within the academic community. On the contrary, this exemption merely gives the Federal Government the discretion not to disclose pursuant to a FOIA request defense-related technical information which is in the possession of the Federal Government, usually pursuant to research and development of procurement contracts. The submitter of such technical data is not precluded from disseminating it to the scientific community or elsewhere.

The bill also adds an additional exemption (b)(11) to FOIA which insures that the Secret Service will receive the cooperation and confidentiality necessary for its mission. As a result, the ability of the Secret Service to safeguard the President and other important individuals as well as informants who provide vital information, will not be compromised. The exemption specifically enables the Secret Service to better fulfill its functions in two ways. First, the Service ill not be compelled to disclose significant security information already on file. Second, the Secret Service's information gathering capacity will be enhanced by the message conveyed to potential informants that any sensitive information that they provide will be protected.

REASONABLY SEGREGABLE

CURRENT LAW

The 1974 amendments to FOIA added a requirement that any portions of requested record that are "reasonably segregable" from exempt portions should be supplied to the requester.

CURRENT POLICY IMPLICATIONS

Although the principle of reasonable segregability is laudable, it can in practice present problems in the fields of law enforcement and national security classifications. In those fields, a sophisticated requester may have the ability to piece together bits of information that seem harmless in isolation yet reveal exempt information when carefully analyzed.

BILL PROVISIONS

The bill clarifies the standard of "reasonable segregability" in the case of records containing material covered by exemptions one and seven allowing the agency to consider whether the disclosure of particular information would, in the context of other information available to the requester, cause the harm specified in exemptions one and seven.

PROPER REQUESTS

CURRENT LAW

Under current law, an agency is required to comply with a request for records made by any person, even if that person is not a U.S. person.

CURRENT POLICY IMPLICATIONS

Existing law allows foreign nationals and governments to make FOIA requests. It is not at all uncommon for one Japanese firm to file a FOIA request seeking information about another Japanese firm or even a U.S. firm with which it competes.

Another aspect of the any person provision that seems somewhat inconsistent with FOIA's goals of an informed citizenry is that the act is heavily used by imprisoned felons. Over 40 percent of all requests received by the Drug Enforcement Administration are from persons in prison; 11 percent of FBI's requests come from prisoners. In many cases, these requesters seek information that could undermine legitimate law enforcement.

Parties to a lawsuit have used FOIA to circumvent discovery rules. The Supreme Court has stated that "FOIA was not intended to function as a private discovery tool." *NLRB* v. *Robbins Tire*, 437 U.S. 214, 242 (1978). Using FOIA as a discovery device can be a technique to avoid triggering reciprocal discovery.

BILL PROVISIONS

The bill modified that aspect of the any person rule that permits aliens to use the U.S. FOIA statute. The Attorney General is granted authority to draft regulations to limit requests by imprisoned felons.

CONCLUSION

The basic purpose of FOIA, more openness in government through an informed citizenry (see *National Labor Relations Board* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1918) is a very worthy and legitimate objective.

Knowledge will forever govern ignorance, and a people who mean to be their own governors must arm themselves with the power knowledge gives. A popular government without popular information or the means of acquiring it is but a prologue to a farce or a tragedy or perhpas both. Letter to W. T. Barry, Lieutenant Governor of Kentucky, August 4, 1822.

This inspiring quote, although written by Madison as an argument for public education, not access to government files, was invoked in 1974 when the 1966 act was substantially rewritten as an appropriate reminder that our national policy favors an open and free exchange of ideas. In fact, another enduring passage would serve

well to remind us of the origins of our Nation's policy on freedom of information. That passage reads as follows: —

Congress shall make no law . . . abridging the Freedom of speech, or of the press. U.S. Constitution, First Amendment.

Besides the obvious virtues of an open government, the Freedom of Information Act (FOIA) is particularly valuable to a nation founded on individual freedom and government accountability. President Reagan has reinvigorated our awareness that the Federal Government must be held accountable for its activities. Otherwise, it could become master rather than servant of the people. In the context of this refreshing new attitude of the Reagan administration, I would like to share a favorite passage from American literature. Henry David Thoreau wrote:

I went to the store the other day to buy a bolt for our front door, for, as I told the storekeeper, the governor was coming here. "Aye," said he, "and the Legislature too." "Then I will take two bolts," said I. He said that there had been a steady demand for bolts and locks of late, for our protectors were coming. H. Thoreau, *Walden and Civil Disobedience*, (O. Thomas ed. 1966).

The Freedom of Information Act can often act like one of Thoreau's bolts; it can protect us from our protectors by giving us sound knowledge about how to comply with government regulations or how to challenge an arbitrary government decision.

Yet achieving an informed citizenry is a goal to be balanced with other vital societal aims. Indeed, society's interest in an open government can conflict with its interest in protecting personal privacy rights and with the overriding public need for preserving the confidentiality of national defense and criminal investigative matters, among other matters. Though tensions among these competing interests are characteristic of a democratic society, their resolution lies in providing a workable formula which encompasses, balances, and appropriately protects all interests, while placing emphasis on fully responsible disclosure. (See S. Rept. 813, 89th Congress, 1st session 3 (1965)).

Just as the Freedom of Information Act holds the government accountable to an informed electorate, FOIA itself must be held accountable. Since the enthusiastic rewrite of the act in 1974, it has at times frustrated rather than fulfilled its basic mission of insuring government efficiency and informing voters. FOIA has occasionally disrupted vital law enforcement activities and has been misused by businesses who had no intention of keeping abreast of government programs but found it a convenient tool for obtaining confidential information about a competitor.

This bill restores the balance between public access to government information and efficient execution of necessary functions. The compromises agreed to in an effort to accommodate the competing interests of open government and confidentiality represent a good-faith effort on all sides to mold a better FOIA. This bill achieves that goal and therefore furthers our deeply engrained notions of an informed citizenry and a responsible government.

By Mr. GRASSLEY (for himself, Mr. THURMOND, Mr. DOLE, and Mr. DENTON):

S. 775. A bill entitled the "Government Accountability Act of 1983", to the Committee on the Judiciary.

GOVERNMENT ACCOUNTABILITY ACT OF 1983

● Mr. GRASSLEY. Mr. President, I am once again introducing legislation together with the distinguished chairman of the Senate Judiciary Committee, Senator STROM THURMOND, Senator BOB DOLE, and Senator JEREMIAH DENTON, to deal equitably with the serious problem of the increasing number of lawsuits filed against Federal employees in their individual or personal capacities.

In the last Congress I introduced nearly indentical legislation to the bill that I am offering today. That bill, S. 1775, was referred to the Judiciary Committee which in turn routed the bill to the subcommittee which I chaired, the Subcommittee on Agency Administration, presently the Subcommittee on Administrative Practice and Procedure. We held three hearings on the bill in the subcommittee and reported the bill to the full Judiciary Committee very close to the lamednck session of Congress. While time was not on our side in the 97th Congress, I intend in this Congress to quickly process this bill and send it to the full committee and Senate floor for consideration.

I had the honor of writing a chapter on the Federal Tort Claims Act for the Free Congress Research and Education Foundation's book, which will be available soon, entitled "Criminal Justice Reform." I believe that this chapter is a helpful analysis of the events that have led to the urgent need for the protections mandated by this legislation and ask that it be printed in the RECORD.

There being no objection, the chapter was ordered to be printed in the RECORD, as follows:

CRIMINAL JUSTICE REFORM

A thirty year veteran forest ranger in the Idaho Panhandle National Forest directs Forest Service employees to remove garbage, rusted bus hulls, and scrap metal from a mining site where it has festered for five years. Prior to implementing the cleanup plans, notice of the removal is provided to the former lessee mining company which delivers no response. The ranger is unaware of a pre-existing agreement that transfers the scrap metal to the plaintiff. Two years after the cleanup, there is a knock on the door and the ranger is greeted with a summons and complaint requesting $48,000 in compensatory damages and $100,000 in punitive damages for violation of the plaintiff's constitutional rights. Three years later, a jury finds against the ranger and awards $1,000 in compensatory damages plus $216.50 in court costs. The appeals process begins.[1]

Federal employees are being increasingly sued for decisions made during the course of a workday. From forest ranger to director of the National Cancer Institute, from meat inspector to cabinet officer, our entire federal workforce is potentially subject to personal liability suits for decisions that are made in carrying out federal missions. Since the Supreme Court's 1971 decision in the case of *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*,[1] federal employees have been subject to personal liability, which translates to money damages, for what the Court termed "constitutional torts". The *Bivens* case arose from a compelling factual setting. Narcotics agents ransacked a citizen's apartment, arrested and manacled him in front of his wife and family, and ushered him to a federal courthouse where he was interrogated, booked, and subjected to a visual strip search. This internment was effectuated without probable cause for a search warrant.

Most constitutional torts arise in a much more mundane setting. While immediately following the *Bivens* decision these actions arose in the context of law enforcement, they increasingly have arisen in the realm of regulatory or personnel actions taken by federal employees.[2]

The Department of Justice estimates that there are at present over two thousand lawsuits pending against federal employees in their individual capacities for alleged violations of constitutional rights. That number is conservative as it relates to actual numbers of federal employees involved in pending litigation because multiple defendants are sued in nearly seventy-five percent of all cases[3] and some cases involve as many as thirty to forty-five defendants.[4] The Department further estimates that since 1971 there have been approximately ten thousand lawsuits lodged against federal employees. Of that total, only fifteen have resulted in judgments for plaintiffs.

As Chairman of the Senate Subcommittee on Agency Administration, I have conducted three hearings on legislation which I introduced in response to what I view as a terribly unfair and unproductive situation. While a federal employee embroiled in litigation undergoes untold anguish, it is the taxpayer who is the ultimate loser in this process; and a triple loser to boot. Taxpayer monies are spent defending employees for what often amount to harassment suits. Taxpayer monies are spent paying employees who are too intimidated by threats of litigation or ensuing litigation to effectively and innovatively carry out their designated functions. Taxpayer monies are spent in paying private attorneys fees resultant from the Department of Justice's policy of hiring outside private counsel where its own representation of a federal employee might produce a conflict of interest.

My legislation is fashioned to make the best use of taxpayer funds while at the same time insuring adequate compensation to a plaintiff whose constitutional rights have been violated. So often is the case, that even if a plaintiff wins a suit, the defendant is judgment proof. The government will be substituted as the exclusive defendant in all constitutional actions and generally the exclusive defendant in all tort suits to which the Attorney General certified that the employee was acting within the scope of his employment. Hence the Department of Justice will no longer have to excuse itself from suits and hire private counsel to avoid con-

[1] Footnotes at end of chapter.

98TH CONGRESS
1ST SESSION

S. 774

Entitled "The Freedom of Information Reform Act".

IN THE SENATE OF THE UNITED STATES

MARCH 11 (legislative day, MARCH 7), 1983

Mr. HATCH (for himself, Mr. THURMOND, and Mr. DECONCINI) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

Entitled "The Freedom of Information Reform Act".

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

FEES AND WAIVERS

SEC. 2. Paragraph (4)(A) of section 552(a) of title 5, United States Code, is amended to read as follows:

"(4)(A)(i) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying the schedule of fees applicable to the processing of requests under this section and establishing procedures and guidelines for determining when such fees should be waived or reduced. Such

schedules shall conform to the guidelines which shall be promulgated, pursuant to notice and receipt of public comment, by the Office of Management and Budget and which shall provide for a uniform schedule of fees for all agencies. Such regulations—

"(a) shall provide for the payment of all costs reasonably and directly attributable to responding to the request, which shall include reasonable standard charges for the costs of services by agency personnel in search, duplication, and other processing of the request. The term 'processing' does not include services of agency personnel in resolving issues of law and policy of general applicability which may be raised by a request, but does include services involved in examining records for possible withholding or deletions to carry out determinations of law or policy. Such regulations may also provide for standardized charges for categories of requests having similar processing costs,

"(b) shall provide that no fee is to be charged by any agency with respect to any request or series of related requests whenever the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee, and

"(c) in the case of any request or series of related requests for records containing commercially valuable

technological information which was generated or procured by the Government at substantial cost to the public, is likely to be used for a commercial purpose, and will deprive the Government of its commercial value, may provide for the charging of a fair value fee or royalties, or both, in addition to or in lieu of any processing fees otherwise chargeable, taking into account such factors as the estimated commercial value of the technological information, its costs to the Government, and any public interest in encouraging its utilization.

Nothing in this subparagraph shall supersede fees chargeable under a statute specifically providing for setting the level of fees for particular types of records.

"(ii) With respect to search and duplication charges, documents shall be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public and not the commercial or other private interests of the requester. With respect to all other charges, documents shall be furnished without such charges where the agency determines that the information is not requested for a commercial use and the request is being made by or on behalf of (a) an individual, or educational, or noncommercial scien-

tific institution, whose purpose is scholarly or scientific research; (b) a representative of the news media; or (c) a non-profit group that intends to make the information available to the general public.

"(iii) One-half of the fees collected under this section shall be retained by the collecting agency to offset the costs of complying with this section. The remaining fees collected under this section shall be remitted to the Treasury's general fund as miscellaneous receipts.".

TIME LIMITS

SEC. 3. Paragraph (6) of section 552(a) of title 5, United States Code, is amended to read as follows:

"(6)(A) Except as otherwise provided in this paragraph, each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall—

"(i) determine within ten working days after the receipt of any such request whether to comply with such request and shall immediately notify the requester of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

"(ii) make a determination with respect to any appeal within twenty working days after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall

notify the requester of the provisions for judicial review of that determination under paragraph (4) of this subsection.

"(B) In unusual circumstances as defined in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the requester setting forth the reasons for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in extensions of more than an aggregate of thirty working days. As used in this subparagraph, 'unusual circumstances' means, but only to the extent reasonably necessary to the proper processing of the particular request—

"(i) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

"(ii) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request;

"(iii) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components

of the agency having substantial subject-matter interest therein;

"(iv) a request which the head of the agency has specifically stated in writing cannot be processed within the time limits stated in paragraph (6)(A) without significantly obstructing or impairing the timely performance of a statutory agency function;

"(v) the need for notification of submitters of information and for consideration of any objections to disclosure made by such submitters; or

"(vi) an unusually large volume of requests or appeals at an agency, creating a substantial backlog.

"(C) Any requester shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. An agency shall not be considered to have violated the otherwise applicable time limits until a court rules on the issue.

"(D) Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to the requester, subject to the provisions of

paragraph (7). Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

"(E) Each agency shall promulgate regulations, pursuant to notice and receipt of public comment, by which a requester who demonstrates a compelling need for expedited access to records shall be given expedited access.".

BUSINESS CONFIDENTIALITY PROCEDURES

SEC. 4. Section 552(a) of title 5, United States Code, is amended by adding after paragraph (6) the following new paragraph:

"(7)(A) Each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying procedures by which—

"(i) a submitter may be required to designate, at the time it submits or provides to the agency or thereafter, any information consisting of trade secrets, or commercial, research, financial, or business information which is exempt from disclosure under subsection (b)(4);

"(ii) the agency shall notify the submitter that a request has been made for information provided by the submitter, within ten working days after the receipt of such request, and shall describe the nature and scope

of the request and advise the submitter of his right to submit written objections in response to the request;

"(iii) the submitter may, within ten working days of the forwarding of such notification, submit to the agency written objection to such disclosure, specifying all grounds upon which it is contended that the information should not be disclosed; and

"(iv) the agency shall notify the submitter of any final decision regarding the release of such information.

"(B) An agency is not required to notify a submitter pursuant to subparagraph (A) if—

"(i) the information requested is not designated by the submitter as exempt from disclosure in accordance with agency regulations promulgated pursuant to subparagraph (A)(i), if such designation is required by the agency;

"(ii) the agency determines, prior to giving such notice, that the request should be denied;

"(iii) the disclosure is required by law (other than this section) and the agency notified the submitter of the disclosure requirement prior to the submission of the information;

"(iv) the information lawfully has been published or otherwise made available to the public; or

"(v) the agency is a criminal law enforcement agency that acquired the information in the course of a lawful investigation of possible violations of criminal law.

"(C) Whenever an agency notifies a submitter of the receipt of a request pursuant to subparagraph (A), the agency shall notify the requester that the request is subject to the provisions of this paragraph and that notice of the request is being given to a submitter. Whenever an agency notifies a submitter of final decision pursuant to subparagraph (A), the agency shall at the same time notify the requester of such final decision.

"(D) Whenever a submitter has filed objections to disclosure of information pursuant to subparagraph (A)(iii), the agency shall not disclose any such information for ten working days after notice of the final decision to release the requested information has been forwarded to the submitter.

"(E) The agency's disposition of the request and the submitter's objections shall be subject to judicial review pursuant to paragraph (4) of this subsection. If a requester files a complaint under this section, the administrative remedies of a submitter of information contained in the requested records shall be deemed to have been exhausted.

"(F) Nothing in this paragraph shall be construed to be in derogation of any other rights established by law protecting the confidentiality of private information.".

JUDICIAL REVIEW

SEC. 5. Section 552(a)(4) of title 5, United States Code, is amended—

(1) by amending subparagraph (B) to read as follows:

"(B) On complaint filed by a requester within one hundred and eighty days from the date of final agency action or by a submitter after a final decision to disclose submitted information but prior to its release, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction—

"(i) to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the requester;

"(ii) to enjoin the agency from any disclosure of records which was objected to by a submitter under paragraph (7)(A)(iii) or which would have been objected to had notice been given as required by paragraph (7)(A)(i); or

"(iii) to enjoin the agency from failing to perform its duties under sections (a) (1) and (2).".

(2) by redesignating subparagraphs (C), (D), (E), (F), and (G) as subparagraphs (F), (G), (H), (I), and (J), respectively, and by adding after subparagraph (B) the following new subparagraphs:

"(C) In an action based on a complaint—

"(i) by a requester, the court shall have jurisdiction over any submitter of information contained in the requested records, and any such submitter may intervene as of right in the action; and

"(ii) by a submitter, the court shall have jurisdiction over any requester of records containing information which the submitter seeks to have withheld, and any such requester may intervene as of right in the action.

"(D) The agency that is the subject of the complaint shall promptly, upon service of a complaint—

"(i) seeking the production of records, notify each submitter of information contained in the requested records that the complaint was filed; and

"(ii) seeking the withholding of records, notify each requester of the records that the complaint was filed.

"(E) In any case to enjoin the withholding or the disclosure of records, or the failure to comply with subsection (a)(1) or (2), the court shall determine the matter de novo. The court may examine the contents of requested agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section. The burden is on the agency to sustain its action to withhold information and the burden is on any submitter seeking the withholding of information."; and

(3) in redesignated subparagraph (H)—

(A) by adding "or any submitter who is a party to the litigation" after "United States"; and

(B) by striking out "complainant" and inserting in lieu thereof "requester".

PUBLIC RECORD REQUESTS

SEC. 6. Section 552(a) of title 5, United States Code, is amended by adding at the end thereof the following new paragraph:

"(8) In any instance in which a portion of the records requested under this subsection consists of newspaper clippings, magazine articles, or any other item which is a public record or otherwise available in public records, the agency may offer the requester a choice of (A) furnishing the requester with an index identifying such clippings, articles, or other

items by date and source, provided that such index is already in existence, or (B) notwithstanding the waiver requirements contained in this section, furnishing the requester with copies of such clippings, articles, or other items at the reasonable standard charge for duplication established in the agency's fee schedule.".

CLARIFY EXEMPTIONS

SEC. 7. So much of section 552(b) of title 5, United States Code, as precedes paragraph (1) thereof is amended to read as follows:

"(b) The compulsory disclosure requirements of this section do not apply to matters that are—".

MANUALS AND EXAMINATION MATERIALS

SEC. 8. Section 552(b)(2) of title 5, United States Code, is amended by inserting a comma in lieu of the semicolon at the end thereof and adding the following: "including such materials as (A) manuals and instructions to investigators, inspectors, auditors, or negotiators, to the extent that disclosure of such manuals and instructions could reasonably be expected to jeopardize investigations, inspections, audits, or negotiations, and (B) examination material used solely to determine individual qualifications for employment, promotion, or licensing to the extent that disclosure could reasonably be expected to compromise the objectivity or fairness of the examination process;".

PERSONAL PRIVACY

SEC. 9. Section 552(b)(6) of title 5, United States Code, is amended to read as follows:

"(6) records or information concerning individuals, including compilations or lists of names and addresses that could be used for solicitation purposes, the release of which could reasonably be expected to constitute a clearly unwarranted invasion of personal privacy;".

LAW ENFORCEMENT

SEC. 10. (a) Section 552(b)(7) of title 5, United States Code, is amended to read as follows:

"(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) would constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency con-

ducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any natural person;".

(b) Section 552(a) of title 5, United States Code, is amended by adding after paragraph (8) thereof the following new paragraph:

"(9) Nothing in this section shall be deemed applicable in any way to the informant records maintained by a law enforcement agency under an informant's name or personal identifier, whenever access to such records is sought by a third party according to the informant's name or personal identifier.".

ADDITIONAL EXEMPTIONS

SEC. 11. Section 552(b) of title 5, United States Code, is amended by striking out "or" at the end of paragraph (8), by striking out the period at the end of paragraph (9) and inserting in lieu thereof a semicolon, and by adding the following new paragraphs after paragraph (9):

"(10) technical data that may not be exported lawfully outside the United States without an approval, authorization, or a license under Federal export laws, except that this section shall apply to such data if regulations promulgated under such laws authorize the export of such data without restriction to any person and any destination; or

"(11) records or information maintained or originated by the Secret Service in connection with its protective functions to the extent that the production of such records or information could reasonably be expected to adversely affect the Service's ability to perform its protective functions.".

REASONABLY SEGREGABLE

SEC. 12. Section 552(b) of title 5, United States Code, is amended by adding after the last sentence thereof the following: "In determining which portions are reasonably segregable in the case of records containing material covered by paragraphs (1) or (7) of this subsection, the agency may consider whether the disclosure of particular information would, in the context of other information available to the requester, cause the harm specified in such paragraph.".

PROPER REQUESTS

SEC. 13. Section 552(a)(3) of title 5, United States Code, is amended to read as follows:

"(3)(A) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request by a requester who is a United States person for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to the requester.

"(B) The time limits prescribed in subparagraph (A) of paragraph 6 shall be tolled whenever the requester (or any person on whose behalf the request is made) is a party to any ongoing judicial proceeding or administrative adjudication in which the Government is also a party and may be requested to produce the records sought. Nothing in this subparagraph shall be construed to bar (i) a request for any records which are not related to the subject matter of such pending proceeding, or (ii) a request for any records which have been denied to a party in the course of a judicial proceeding or administrative adjudication that is no longer pending.

"(C) The Attorney General, in accordance with public rulemaking procedures set forth in section 553 of this title, may by regulation prescribe such limitations or conditions on the extent to which and on the circumstances or manner in which records requested under this paragraph or under section 552a of this title shall be made available to requesters

who are persons imprisoned under sentence for a felony under Federal or State law or who are reasonably believed to be requesting records on behalf of such persons, as he finds to be (i) appropriate in the interests of law enforcement, or foreign relations or national defense, or of the efficient administration of this section, and (ii) not in derogation of the public information purposes of this section.".

ORGANIZED CRIME

SEC. 14. Section 552 of title 5, United States Code, is amended by adding a new subsection (c) as follows and redesignating the current subsections (c), (d), and (e) as (d), (e), and (f) respectively.

"(c) Nothing in this section shall be deemed applicable to documents compiled in any lawful investigation of organized crime, designated by the Attorney General for the purposes of this subsection and conducted by a criminal law enforcement authority for law enforcement purposes, if the requested document was first generated or acquired by such law enforcement authority within five years of the date of the request, except where the agency determines pursuant to regulations promulgated by the Attorney General that there is an overriding public interest in earlier disclosure or in longer exclusion not to exceed three years. Notwithstanding any other provision of law, no document de-

scribed in the preceding sentence may be destroyed or otherwise disposed of until the document is available for disclosure in accordance with subsections (a) and (b) of this section for a period of not less than ten years.".

REPORTING UNIFORMITY

SEC. 15. Section 552(e) of title 5, United States Code (as redesignated), is amended—

(1) by striking out "calendar" the second and fourth places it appears and inserting in lieu thereof "fiscal";

(2) by striking out "March" each place it appears and inserting in lieu thereof "December";

(3) in paragraph (4), by striking out "subsection (a)(4)(F)" and inserting in lieu thereof "subsection (a)(4)(I)"; and

(4) in the next to last sentence, by striking out "subsections (a)(4) (E), (F), and (G)" and inserting in lieu thereof "subsections (a)(4) (H), (I), and (J).".

TECHNICAL DATA PROCEDURES

SEC. 16. Title 5 of United States Code is amended by adding after section 559 a new section 560 as follows:

"SEC. 560. Each Federal agency maintaining technical data exempt under subsection (b)(10) of section 552 of this title shall promulgate regulations establishing registration (including certification) procedures and criteria under which

qualified United States individuals and business concerns may obtain copies of such Government-owned technical data for purposes of bidding on Government contracts. No data obtained under such procedures may be redisseminated or exported except as provided by law.''.

DEFINITIONS

SEC. 17. Section 552(f) of title 5, United States Code (as redesignated), is amended to read as follows:

''(f) For purposes of this section—

''(1) 'agency' means any executive department, military department, Government corporation, Government-controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency;

''(2) 'submitter' means any person who has submitted to an agency (other than an intelligence agency), or provided an agency access to, trade secrets, or commercial, research, or financial information (other than personal financial information) in which the person has a commercial or proprietary interest;

''(3) 'requester' means any person who makes or causes to be made, or on whose behalf is made, a proper request for disclosure of records under subsection (a);

"(4) 'United States person' means a citizen of the United States or an alien lawfully admitted for permanent residence (as defined in section 101(a)(20) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(20)), an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States, but does not include a corporation or an association that is a foreign power, as defined in section 101(a) of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801(a));

"(5) 'working days' means every day excluding Saturdays, Sundays, and Federal legal holidays; and

"(6) 'organized crime' means those structured and disciplined associations of individuals or of groups of individuals who are associated for the purpose of obtaining monetary or commercial gains or profits, wholly or in part by illegal means, while generally seeking to protect and promote their activities through a pattern of graft or corruption, and whose associations generally exhibit the following characteristics:

"(A) their illegal activities are conspiratorial,

"(B) in at least part of their activities, they commit acts of violence or other acts which are likely to intimidate,

"(C) they conduct their activities in a methodical or systematic and in a secret fashion,

"(D) they insulate their leadership from direct involvement in illegal activities by their organizational structure,

"(E) they attempt to gain influence in government, politics, and commerce through corruption, graft, and illegitimate means, and

"(F) they engage in patently illegal enterprises such as dealing in drugs, gambling, loansharking, labor racketeering, or the investment of illegally obtained funds in legitimate businesses.".

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